IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1165 OF 2006

Mr. Mohin Issaq Shaikh ... Petitioner.

V/s.

The State of Maharashtra. ... Respondent.

Mr.Jayesh B. Kocheta, for the Petitioner.
Mr.A.S. Shitole, A.P.P. for the State.

CORAM : A.S. OKA, J.
DATE : 01ST SEPTEMBER, 2006.

P.C. :

1. Rule. Learned APP waives service for the Respondent - State. Considering the facts and circumstances of the case, taken up for hearing forthwith.

2. C.R.No.68 of 2001 was registered against accused No.1 Mayur Chunilal Patel and his unknown companions for the offence punishable under Sections 364, 365 read with Section 34 of the Indian Penal Code. Accused No.1 - Mayur Chunilal Patel was arrested in July 2001. Subsequently, accused Nos.2 to 6 were arrested. The Petitioner who is the accused No.7 was arrested on 27th March 2002. Prior to his arrest, the case was already committed to the Court of Sessions by showing one Nazir Yasin Shaikh and one unknown person as abscounding accused. The Petitioner was enlarged on bail. Thereafter, the Police filed additional charge sheet against the Petitioner. The learned Judicial Magistrate took cognizance of the additional charge-sheet

and committed the case to the Court of Sessions. The earlier case was numbered as Sessions Case No.519 of 2001 and the case against the Petitioner was numbered as Sessions Case No.201 of 2004. In April 2003 bail granted in favour of the Petitioner was cancelled.

3. The Respondent State filed an Application at Exhibit 256 in Sessions Case No.519 of 2001 praying that evidence recorded in the said case be read as evidence against the Petitioner in Case No.201 of 2004. The second prayer in the Application was for clubbing both the cases together for further recording of evidence. The last prayer was for recalling five prosecution witnesses. The said Application was opposed by the Petitioner by filing his reply. By the impugned Judgment and Order dated 25th April 2006, the learned Sessions Judge, Pune allowed the said application at Exhibit 256 in terms of Prayer clauses (a) to (c).

4. The learned Advocate for the Petitioner pointed out that evidence recorded in the Sessions Case No.519 of 2001 before the date on which the said Sessions Case was clubbed with the case against the Petitioner cannot be read in evidence against the Petitioner as the said evidence has been admittedly recorded behind his back. He submitted that the learned Sessions Judge could not have passed an order directing clubbing of the cases. The learned A.P.P. submitted that the permission granted by

the impugned order in terms of prayer clause (c) of the application at Exhibit 256 has been acted upon and PW-1, PW-5, PW-6, PW-7 and PW-15 in the Sessions Case No.519 of 2001 were recalled and they have been examined and even cross-examined by the Advocate for the Petitioner. He submitted that as the order is already acted upon, no interference was called for. On the instructions of the Investigation Officer, the learned A.P.P. states that the prior to the date on which both the cases were ordered to be clubbed together, 23 prosecution witnesses were examined in Sessions Case No.519 of 2001. He states that out of the said 23 witnesses, 5 were recalled as aforesaid and have been examined and cross examined. He states that in so far as the Petitioner is concerned the prosecution does not desire to rely upon the evidence of the prosecution witnesses who were examined in Sessions Case No.519 of 2001 prior to the date on which both the cases were clubbed together save and except the evidence of the aforesaid 5 witnesses. He stated that in case the prosecution desires to rely upon the evidence of any one of those witnesses against the Petitioner, the prosecution will recall the said witnesses. The statements made by the learned A.P.P. are accepted.

6. I have considered the submissions. No fault can be found with the order of the learned Sessions Judge of directing that the two Sessions Cases be clubbed together for the purposes of recording of the further evidence.

Both the Sessions Cases arise out of the same offence. As stated earlier, it is not in dispute that PW-1,5,6,7 and 15 in Sessions Case No.519 of 2001 were recalled on the basis of the impugned order. It is also not in dispute that examination-in-chief of the said witnesses was recorded and the Advocate for the Petitioner has cross-examined them. Hence evidence of the said five witnesses can be read against the Petitioner. As stated above, the Investigation Officer has stated that the evidence of any other prosecution witness who is already examined in Sessions Case No.519 of 2001 in the absence of the Petitioner will not be used against the Petitioner unless the witnesses concerned are recalled and examined again. Thus, there is no prejudice to the Petitioner. However, prayer Clause (a) of the Application could not have been granted as the evidence which was recorded in the Sessions Case No.51 of 2001 in the absence of the Petitioner could not have been read against the Petitioner unless a case was made out under Section 299 of the Code of Criminal Procedure, 1973.

7. Hence, Application is disposed of by passing the following order :-

(a) The part of the impugned order which relates to prayer clause (a) of application at exhibit 256 is quashed and set aside.

(b) The statements made by the learned APP on instructions of the Investigation Officer which are recorded above are accepted.

(c) In view of the said statements rest of the impugned order is confirmed.

(d) Rule is made partly absolute in the above terms with no order as to costs.

(e) Parties and concerned Court to act upon an authenticated copy of the order.

JUDGE